Buffalo Law Review

Volume 21 | Number 2 Article 18

1-1-1972

Property—Sale of Stock and Proprietary Lease in Cooperative Apartment Held as Sale of Personalty

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abdicated its duty to act as the balancing factor on the other branches of government. If the legislature will not police itself and the courts will not intervene, persons inside our prisons will continue to be "out of sight and out of mind" and subject to the caprices of their jailors.

ROBERT E. WHITE

PROPERTY—SALE OF STOCK AND PROPRIETARY LEASE IN COOPERATIVE APARTMENT HELD AS SALE OF PERSONALTY

Plaintiff Silverman had deposited $15,400 with defendant Alcoa Plaza Associates[1] as down payment for the purchase of shares of stock and a proprietary lease in a cooperative apartment. The total purchase price was to be $154,000. Silverman defaulted and Alcoa retained the deposit as damages. Alcoa subsequently sold the stock and lease to a third party for the same price. Upon learning of this transaction, Silverman instituted suit for recovery of the deposit, seeking to limit Alcoa to its actual damages. On motion for summary judgment, Alcoa contended that Silverman had wilfully breached a contract involving the sale of real estate, and thus Alcoa was entitled to retain the deposit. The supreme court at special term[2] granted Alcoa's motion, holding that the stock could not be characterized as "goods" under article 2 of the Uniform Commercial Code,[3] but rather that the sale involved real property with damages awardable accordingly. The appellate division reversed, granting Silverman's cross motion for summary judgment, and remanded for a hearing regarding damages. *Held*, shares of cooperative stock relative to a proprietary lease are "goods" within article 2 of the U.C.C.; as such, the rights of the parties regarding the deposit should be determined in accordance

1. Hereinafter referred to as Alcoa.

2. Silverman v. Alcoa Plaza Associates, 37 App. Div. 2d 166, 167, 323 N.Y.S.2d 39, 40 (1st Dep't 1971) [hereinafter cited as instant case].

3. N.Y. U.C.C., art. 2, § 2-105 (1) (McKinney 1964) provides that:

'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than money in which the price is to be paid, investment securities (Article 8) and things in action.

with section 2-718.[4] *Silverman v. Alcoa Plaza Associates,* 37 App. Div. 2d 166, 323 N.Y.S.2d 39 (1st Dep't 1971).

There is a significant difference between personal and real property. Personal property is statutorily defined as including certain tangibles and everything which may be the subject of ownership except real property.[5] Real property is defined as being "coextensive in meaning with lands, tenements and hereditaments."[6] The distinction is especially relevant when the measure of damages is involved. Classifying the transaction as involving personal or real property is antecedent to determining whether or not the seller-vendor may retain the buyer-vendee's deposit. If the action is one for damages resulting from a buyer's breach involving personal property (goods), the seller may recover the difference between the resale price and the contract price together with any permissible incidental damages, but less expenses saved

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4. *Id.* at § 2-718 provides that:

1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasability of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

5. N.Y. GEN. CONSTR. LAW § 39 (McKinney 1951) provides that personal property includes:

[C]hattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced . . . wholly or in part, and everything, except real property, which may be the subject of ownership.

6. N.Y. REAL PROP. LAW § 2 (McKinney 1968).

in consequence of the buyer's breach.[7] If the action is one involving real property, a seller may retain a wilfully defaulting buyer's down payment even though the seller resells the property for a sum equal to or greater than the contract price.[8]

In determining the measure of damages, the court will look to the parties' intention[9] in forming the contract as well as any statutory or decisional guidelines. Absent a liquidated damages clause[10] or other similar contractual provision,[11] the retention of

7. N.Y. U.C.C. § 2-706. *Contra,* Waldman v. Greenberg, 265 App. Div. 827, 37 N.Y.S. 2d 565 (2d Dep't 1942). In a buyer's action to recover a payment made under a contract for the purchase of certain crockery and dishware, the court held that since the buyer had willfully breached, he was not entitled to recover any of the money paid. "The monies characterized as a 'deposit' were, as the terms of the contract show, a payment on account of the purchase price. Such monies cannot be recovered where the purchaser has breached the contract." *Id.* at 828, 37 N.Y.S.2d at 566. It should be noted that *Waldman* is apparently superseded by section 2-706.

8. Silverstein v. United Cerebral Palsy Ass'n, 17 App. Div. 2d 160, 232 N.Y.2d 968 (1st Dep't 1962). In an action to recover the sum paid to the vendor in connection with a contract for the purchase of certain realty by the plaintiff-vendees, the vendor was entitled to retain the deposit if, upon a retrial of the facts, it was found that the sum was a down payment. The court stated: "Where the payment by a vendee was a down payment on the purchase price and not merely made as a binder for a future contract . . . and he willfully defaults under his contract, it is settled in this state that he may not in law or in equity recover his down payment even though the vendor resells the premises for a sum equal to or greater than the contract price." *Id.* at 164-65, 232 N.Y.S. 2d at 972-73. *But see* Freedman v. Rector, 37 Cal. 2d 16, 230 P.2d 629 (1951) in which a defaulting buyer was held to be entitled to return of his deposit because the seller had resold the property for a sum above the contract price. This decision must, however, be weighed in light of the fact that many land purchase contracts in California are, unlike in New York, land installment contracts. *See* Warren, *California Installment Land Sales Contracts: A Time for Reform,* 9 U.C.L.A. L. REV. 608 (1962).

9. Kasen v. Morrell, 6 App. Div. 2d 816, 175 N.Y.S.2d 315 (2d Dep't 1958); Halperin v. McCrory Stores Corp., 207 App. Div. 448, 202 N.Y.S. 385 (2d Dep't 1923).

10. The term "liquidated damages" describes the compensation which the parties to a contract agree in advance is to be paid to one of the parties in satisfaction of the loss or injury which will follow from a breach of the contract by the other party and will be considered a penalty unless two criteria are met: (1) the amount must be reasonable and the actual damages in case of a breach must not be readily ascertainable (Wirth & Hamid Fair Booking, Inc. v. Wirth, 265 N.Y. 214, 192 N.E. 297 (1934)); (2) liquidated damages exist only by virtue of an express agreement between the parties (Winkleman v. Winkleman, 208 App. Div. 68, 203 N.Y.S. 63 (1st Dep't 1924)). *See also* Kaplan v. Scheiner, 1 App. Div. 2d 329, 149 N.Y.S.2d 868 (1st Dep't 1956). This case involved an action against the vendors on a contract for a deed which provided that time was of the essence. If on the closing date the vendee refused to perform, the amount paid on account would be forfeited as liquidated damages. The court held that contract provisions for liquidated damages did not in any way weaken the vendor's right to retain such part payment. The court reasoned: "[W]hen the purchaser has been unready or unwilling to perform, he is in default and may not be permitted to recover any part payment given on account of the purchase price." *Id.* at 330, 149 N.Y.S.2d at 869-70.

11. The parties, of course, have the right to insert any stipulation to which they might agree, providing it is not unconscionable or contrary to public policy. 379 Madison Ave., Inc. v. Stuyvesant Co., 242 App. Div. 567, 275 N.Y.S. 953 (1st Dep't), *aff'd,* 268 N.Y. 576, 198 N.E. 412 (1934).

the deposit may assume the appearance of a forfeiture. As a result, there has been a reluctance to enforce forfeiture clauses,[12] save in the instance of a breach of contract relating to realty. Under the New York Sales of Goods Act of 1911[13] a seller of personalty was deprived of his former common law right to sue a defaulting buyer for the agreed upon purchase price; rather, he could maintain an action only for those damages directly and naturally resulting from the buyer's breach.[14] In 1952, this statute was superseded by section 145 of the Personal Property Law which similarly provided that in the absence of a liquidated damages clause, the seller was restricted to his actual damages in the case of a breach by the buyer.[15] Thus, in determining the measure of damages in the instant case, it became essential to consider whether an interest in a cooperative apartment, namely a proprietary lease, constituted personalty or realty.

A cooperative apartment is a multi-unit dwelling in which each resident has both an interest in the entity (often a corporation) which owns the building and a lease entitling him to occupy a particular apartment within the building. This right to occupy is embodied in a "proprietary" lease between the corporate landlord and the tenant shareholder.[16] The tenancy has additional characteristics: for example, the tenant has a vote in deciding how the cooperative is to be run; he pays property taxes via his monthly carrying charges; and he depends upon the financial solvency of the

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12. In a replevin action to recover possession of plaintiff's automobile, the court held that forfeitures are not favored in law, and that statutes designed to relieve the rigors of forfeitures are looked upon favorably and construed liberally by the courts. Cortes v. Rosetti, 38 Misc. 2d 250, 235 N.Y.S.2d 403 (New York City Civ. Ct. 1962). For the realty concept, in which forfeiture of a down payment is permitted, see Beveridge v. West Side Constr. Co., 130 App. Div. 139, 114 N.Y.S. 521 (1st Dep't 1909).

13. [1911] N.Y. Sess. Laws ch. 571.

14. [1911] N.Y. Sess. Laws ch. 571, § 145 (2) provided:

The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

15. [1952] N.Y. Sess. Laws ch. 823, § 1 provided:

1. Where the buyer has defaulted by failing to pay money or transfer goods as required of him by the contract of sale but has made payments . . . in part performance of the contract, and the seller fails or refuses to deliver the goods which he had contracted to deliver and is justified therein by the buyer's default, the buyer is entitled to that amount, if any, by which the payments he has made . . . exceeds
   (a) the amount to which the seller is entitled by the terms of a clause, if any, in the contract, which constitutes a reasonable liquidation in advance of the seller's anticipated damages . . . .

16. C. BERGER, LAND OWNERSHIP AND USE 172-75 (1968) [hereinafter cited as BERGER].

whole project to render his leasehold secure. There has been much confusion in New York, however, over the nature of the interest which the tenant obtains. The tenant has been referred to as being an "owner,"[17] "partner,"[18] and "proprietary lessee."[19] At least for purposes regarding the return of a down payment,[20] New York decisional law has established that a lease is personal property.[21] However, in the case of a cooperative apartment, the court must also determine the nature of the stock interest which the tenant-shareholder acquires.

Under the Sales of Goods Act,[22] a sale of corporate stock was held to be a sale of "goods." A leading case under this statute, *Agar v. Orda,*[23] involved a seller's action to recover the agreed upon purchase price for 200 shares of stock from a defaulting buyer. The Supreme Court of New York County noted the confusion regarding the nature of the shares of stock,[24] and held that shares of stock were "goods" within the meaning of the Sales Act:

> Although the historical correctness of this rule may be challenged, it reflects a practical rather than a legalistic concep-

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17. 1165 Fifth Ave. Corp. v. Alger, 288 N.Y. 67, 41 N.E.2d 461 (1942).

18. The court in one instance concluded that the relationship between the tenant-owners of a cooperative apartment was in effect "a partnership for the mutual benefit of the cooperative owners expressed in corporate terms." Tompkins v. Hale, 172 Misc. 1071, 1073, 15 N.Y.S.2d 854, 857 (Sup. Ct. 1939), *aff'd,* 259 App. Div. 860, 20 N.Y.S.2d 398 (1st Dep't), *aff'd,* 284 N.Y. 675, 30 N.E.2d 721 (1940).

19. People *ex rel.* McGoldrick v. Sterling, 283 App. Div. 88, 126 N.Y.S.2d 803 (1st Dep't 1953).

20. *See* Silverstein v. United Cerebral Palsy Ass'n, 17 App. Div. 2d 160, 232 N.Y.S.2d 968 (1st Dep't 1962) (discussed *supra* note 8); *accord,* Arroyo v. Patayne Estates, Inc., 25 App. Div. 2d 424, 266 N.Y.S.2d 565 (1st Dep't 1966), *citing* Silverstein v. United Cerebral Palsy Ass'n, *supra.*

21. A lease, as an estate for years, has been held to constitute personalty in cases involving: tax assessments (Oak Island Beach Ass'n v. Mascari, 47 Misc. 2d 21, 261 N.Y.S.2d 982 (Sup. Ct. 1965), *aff'd,* 25 App. Div. 2d 496, 267 N.Y.S.2d 192 (2d Dep't), *aff'd,* 18 N.Y.2d 861, 222 N.E.2d 735, 276 N.Y.S.2d 116 (1966)); right of transit and access through leased premises (Nemmer Furniture Co. v. Select Furniture Co., 25 Misc. 2d 895, 208 N.Y.S.2d 51 (Sup. Ct. 1960)); and damages suffered by a change in the grade of an approach to a bridge (Ehrsam v. City of Utica, 37 App. Div. 272, 55 N.Y.S. 942 (4th Dep't 1899)). The interest of a tenant of real property under a lease is not real property, but a chattel real, which is personal property. Fort Hamilton Manor, Inc. v. Boyland, 4 N.Y.2d 192, 149 N.E.2d 856, 173 N.Y.S.2d 560 (1958). *But see* N.Y. REAL PROP. LAW § 290(1) (McKinney 1968) which treats leases, except those for a term not exceeding three years, as real property for recording purposes.

22. [1911] N.Y. Sess. Laws ch. 571.

23. 144 Misc. 149, 258 N.Y.S. 274 (Sup. Ct. 1932), *aff'd,* 239 App. Div. 827, 264 N.Y.S. 939 (1st Dep't 1933), *aff'd,* 264 N.Y. 248, 190 N.E. 479 (1934).

24. "The question whether shares of stock are 'goods' within the meaning of the Sales Act has long been the subject of controversy." *Id.* at 152, 258 N.Y.S. at 276.

> tion of the status of shares of corporate stock, and tends to conform to the needs of modern business practice.[25]

Even though the Personal Property Law replaced the Sales of Goods Act in 1952, the reasoning of *Agar* was reiterated in subsequent cases. In 1956, the court in *Rosenzweig v. Salkind*[26] held that "shares of stock are 'goods' within the provisions of the Personal Property Law."[27] Although the Personal Property Law was in turn superseded by the U.C.C. in 1962, its spirit still persisted in the Code. Two U.C.C. provisions are relevant in determining the nature of the tenant's stock. Section 2-105 deals with the definition of goods,[28] and section 8-102 defines "investment securities."[29] If the tenant's interest is defined as "goods," then the damage formula will be within article 2 and the deposit amount will be recoverable, minus any damages actually suffered by the seller.[30] If the interest is seen as being within the definition of "investment securities," then it will be excluded from article 2,[31] and the damage formula of section 2-718 will not apply.[32]

25. *Id.* at 154, 258 N.Y.S. at 278.

26. 6 Misc. 2d 284, 158 N.Y.S.2d 522 (Sup. Ct. 1956). In this case, plaintiff seller sued defendant buyer to recover the sum of $12,500 which the defendant had contracted to pay the plaintiff as the purchase price for 50 shares of common stock in Fair Maid Cottons, Inc. The court held for the plaintiff on the grounds that he was frustrated from reselling the stock since no ready open market existed.

27. *Id.* at 287, 158 N.Y.S.2d at 524. *See also* Kukoff v. Muss, 6 Misc. 2d 807, 810, 160 N.Y.S.2d 156, 159 (Sup. Ct. 1957) in which the court held "that corporate stock partakes of the nature of goods has been settled by the holding in Agar v. Orda . . . ."

28. N.Y. U.C.C. art. 2, § 2-105 (1) (text quoted *supra* note 3).

29. N.Y. U.C.C. art. 8, § 8-102 defines an investment security as an instrument which:
i) is issued in bearer or registered form; and
ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and
iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; and
iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

30. N.Y. U.C.C. art. 2, § 2-718 (text quoted *supra* note 4).

31. *See* text quoted *supra* note 3.

32. At common law, a seller has three remedies for a buyer's breach of a contract to purchase specified securities. A seller may treat the stock as belonging to the buyer, and recover the contract price; he may resell the stock as an agent of the buyer and recover the difference between the contract price and the net amount received on resale; or he may keep the shares of stock and recover as damages the difference between the contract price and the value of the stock at the time the buyer should have accepted. Mason v. Decker, 72 N.Y. 595 (1878). *See also* Henry Glass & Co. v. Misroch, 239 N.Y. 475, 147 N.E. 71 (1925); D'Aprile v. Turner-Looker Co., 239 N.Y. 427, 147 N.E. 15 (1925). N.Y. U.C.C. art. 8, § 8-107 provides that where a security has been delivered or tendered to a purchaser pursuant to a contract and the purchaser wrongfully defaults, the seller may recover the agreed upon price of the security. *See also* Agar v. Orda, 264 N.Y. 248, 190 N.E. 479 (1932) (a seller may be entitled to recover damages from one who agrees to buy and then repudiates).

In the New York annotations to section 2-105,[33] the definition of "goods" is seen as being compatible with the prior statutes. As has been shown, under the previously applicable Sales of Goods Act and the Personal Property Law, both a lease and corporate stock were considered personalty.[34] If the Code is to be interpreted consistently with these prior statutes, then the same classifications should continue to apply. This reasoning seems to be supported by *Susskind v. 1136 Tenants Corp.*,[35] a 1964 case decided after the enactment of the U.C.C. In that case, stockholders of a cooperative apartment corporation brought an action against the corporation to recover damages arising from the corporation's failure to repair certain structural defects. The court held for the stockholders regarding the corporate landlord's liability for repairs. In reaching this decision, the City Court of New York stated:

> An estate measured by a definite number of years, such as a leasehold of a co-operative apartment, is personalty and not realty . . . and the fact that stock ownership is prerequisite to the procurement of the lease does not affect the legal classification of these assets as personal property . . . .[36]

Both *Susskind* and a 1968 case, *Carden Hall, Inc. v. George*,[37] hold that the relationship between stockholder and corporation in a cooperative apartment situation is that of tenant and landlord. Since this means that the parties are governed by a lease agreement, the lease being personal property, the rule of damages regarding personal property will apply. Under the reasoning of *Susskind*, this is possible since "stock ownership . . . does not affect the legal classification of [the lease interest] as personal property."[38] Moreover, the securities would be considered "goods" within section 2-105 of the U.C.C.,[39] invoking the damage remedy of section

33. N.Y. U.C.C. § 2-105, annot. 1.

34. Cases cited *supra* notes 20, 25, 27.

35. 43 Misc. 2d 588, 251 N.Y.S.2d 321 (New York City Civ. Ct. 1964).

36. *Id.* at 591, 251 N.Y.S.2d at 326.

37. 56 Misc. 2d 865, 290 N.Y.S.2d 430 (Sup. Ct. 1968). In this action, a cooperative housing development sought to compel a tenant to remove a dishwasher from his apartment in accordance with a recently promulgated rule of the cooperative. The court held that the cooperative failed to carry its burden of demonstrating that it had the right, pursuant to the occupancy agreement, to subsequently modify the agreement and rescind the tenant's right to use the washing machine.

38. Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 591, 251 N.Y.S.2d 321, 326 (New York City Civ. Ct. 1964).

39. Text quoted *supra* note 3.

2-718.[40] However, in the Official Comment to section 8-102[41] the definition of "security" is offered as being "functional rather than formal." It would seem that the stock acquired in a cooperative apartment is more functionally related to leasehold interests than to investment securities,[42] with the legislative intent requiring that the stock be classified in light of such leasehold interests. Thus, even if the stock is considered as an investment security, a functional interpretation would seem to dictate that since the leasehold is the principal interest with which the parties are concerned, it should take precedence over the securities interest. In either case, the leasehold is the controlling interest; it is personal property,[43] and damages must be awarded accordingly.

The court in the instant case viewed the principal issue as "whether or not the underlying sale of the stock and proprietary lease in the co-operative apartment was one of realty or personalty."[44] The classification of the cooperator's interest was necessary so that the proper measure of damages would be applied.[45] The majority, speaking through Justice Murphy, noted the lack of appellate decisions relating to this problem, save *Kaplan v. Scheiner*.[46] They distinguished that precedent since the contract in that case, unlike the present situation, contained a liquidated damages clause.[47] Moreover, since that case was decided in 1956, prior to the enactment of the U.C.C., it was not seen as controlling. The

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40. Text quoted *supra* note 4. A New York court evidenced the problem when it said: "The term 'security' has no exactly defined legal definition." *In re* Waldstein, 160 Misc. 763, 766, 291 N.Y.S. 697, 700 (Sup. Ct. 1936).

41. The official comments upon the Uniform Commercial Code are set forth in McKinney's Consolidated Laws of New York, Book 62½, Part 1, with special reference to pages 96-97 which are pertinent to the case at bar read as follows:

> 'Investment securities' are expressly excluded from the coverage of this Article. It is not intended by this exclusion, however, to prevent the application of a particular section of this Article by analogy to securities . . . when the reason of that section makes such application sensible and the situation involved is not covered by the Article of this Act dealing specifically with such securities (Article 8).

Instant case at 170, 323 N.Y.S.2d at 43.

42. *But see* Note, *Cooperative Housing Corporations and the Federal Securities Laws*, 71 COLUM. L. REV. 118 (1971) for the need to consider the interest in cooperative housing as "securities" on a federal level.

43. *See* cases cited *supra* notes 19-20.

44. Instant case at 168, 323 N.Y.S.2d at 41.

45. *Id.*

46. 1 App. Div. 2d 329, 149 N.Y.S.2d 868 (1st Dep't 1956).

47. Instant case at 168, 323 N.Y.S.2d at 41. *See supra* note 10.

court cited a number of cases,[48] including *Agar v. Orda*,[49] in which the term "goods" was held to include stock certificates. The majority compared the definition of "goods" under the Personal Property Law and the U.C.C., and concluded that they are substantially similar.[50] The court recognized that U.C.C. section 2-105 excludes "investment securities,"[51] but reasoned that this exclusion was an attempt to make the provisions of article 2 and article 8 "harmonious rather than mutually exclusive."[52] The court quoted the Official Comments to article 2 and the definition of investment securities in section 8-102[53] of the U.C.C. and reasoned that since cooperative apartment stock does not fall within this definition, article 2 must, perforce, apply.[54] The court then determined that the parties originally intended the contract as one for the sale of personalty.[55] The opinion cited *Susskind v. 1136 Tenants Corp.*[56] and reasoned that a proprietary lease is no different than any other type of lease;[57] it is personal property. It further reasoned that co-

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48. Ballentine v. Ferretti, 255 App. Div. 606, 8 N.Y.S.2d 436 (1st Dep't 1938); Kukoff v. Muss, 6 Misc. 2d 807, 160 N.Y.S.2d 156 (Sup. Ct. 1957); Rosenzweig v. Salkind, 6 Misc. 2d 284, 158 N.Y.S.2d 522 (Sup. Ct. 1956); *In re* Galewitz, 206 Misc. 218, 132 N.Y.S.2d 297 (Sur. Ct. 1954); Coyne v. Chatham Phoenix Nat'l Bank & Trust Co., 153 Misc. 656, 281 N.Y.S. 271 (New York City Ct. 1935).

49. 264 N.Y. 248, 190 N.E. 479 (1934).

50. Instant case at 170, 323 N.Y.S.2d at 43.

51. *See* text quoted *supra* notes 3 & 29.

52. Instant case at 170, 323 N.Y.S.2d at 43. The court further stated:

> We believe that even if Article 8 is deemed to apply to cooperative apartment stock, that Article 8 is to be read in conjunction with Article 2, and where Article 8 is silent, Article 2 is applicable.

Id.

53. *Id. See* text quoted *supra* note 29.

54. It would be extremely illogical to contend that the legislature intended to turn the clock back with respect to the broad range of stock certificates covered by Article 8 to the situation which prevailed when the rights of the parties were governed by the common law as it existed in this State prior to the enforcement of the Sales of Goods Act.

Instant case at 171, 323 N.Y.S.2d at 44.

55. The contract contains none of the classic clauses that are found within the standard real estate contracts. No questions relating to the marketability of the property are set forth within the contract. Nor are there provisions for the execution or delivery of a deed, or a provision for title insurance. In addition, there is no provision for payment by the seller, nor does the defendant claim that it paid to the City of New York any New York City Real Property Transfer Tax. There was no provision for payment of revenue stamps on any instrument of any kind. As a matter of fact, the contract in question called for the payment of the required stock transfer stamps, rather than any revenue stamps.

Id. at 171-72, 323 N.Y.S.2d at 44.

56. 43 Misc. 2d 588, 251 N.Y.S.2d 321 (New York City Civ. Ct. 1964).

57. Instant case at 172, 323 N.Y.S.2d at 45.

operative apartment stock is just like any other stock in a corporation owning real estate. The majority concluded that the shares in a cooperative apartment are "goods" within article 2 of the U.C.C.,[58] and since the law frowns upon forfeiture,[59] the deposit made under the contract should be disposed of in accordance with section 2-718 of the U.C.C.

Justices Eager and Steuer dissented in an opinion filed by Justice Steuer. The dissent would have affirmed the judgment directed by special term.[60] Like the majority, the dissent recognized the necessity of classifying the transaction as one involving personalty or realty.[61] The dissent reasoned, however, that the inherent nature of the property right was controlling,[62] and since "the dominant characteristic of such shares [in a cooperative] is the right to a proprietary lease,"[63] they are distinguishable from ordinary corporate stock ownership. The dissent further noted that while the owner did not acquire a fee in the apartment, he possessed so many of the rights and obligations peculiar to fee ownership[64] that his status is for practical purposes indistinguishable. The dissent concluded:

> However, even if the shares be regarded as personalty under the common law of this state, the deposit is not recoverable [citations omitted]. It is claimed that this has been superseded by statute, the Uniform Commercial Code, Article 2. That ar-

58. *Id.*
59. *Id.* at 168, 323 N.Y.S.2d at 41.
60. *Id.* at 173, 323 N.Y.S.2d at 45.
61. *Id.*
62. Cooperative apartments made their appearance long after classic distinctions between realty and personalty were formulated, and the guidlines to classification should be established by the inherent nature of the property right rather than mere superficial resemblances to other forms.

Id.

63. *Id.*
64. The dissent lists the following: The Statute of Frauds applicable to real estate transactions applies to sales of cooperative stock (Frank v. Rubin, 59 Misc. 2d 796, 300 N.Y.S.2d 273 (Sup. Ct. 1969)); the stock has been treated as realty in determining the priority of judgment and tax liens (Lacaille v. Feldman, 44 Misc. 2d 370, 253 N.Y.S.2d 937 (Sup. Ct. 1964)); the shareholder has been authorized to bring summary eviction proceedings (Curtis v. LeMay, 186 Misc. 853, 60 N.Y.S.2d 768 (New York City Mun. Ct. 1945)); Federal and New York State income tax laws give the same privileges to cooperative share owners as they do to fee owners in many respects (INT. REV. CODE of 1954, §§ 121(a), (d) (3), 216, 1034 and N.Y. TAX LAW § 360(12)). "In addition, alienability, liability for maintenance and repairs, as well as the privileges of making interior alterations, give a popular recognition to the status of realty quite in accord with the decisional law which treats this type of property as realty." Instant case at 173, 323 N.Y.S.2d at 46.

> ticle has no application. It refers to 'goods' which by definition (§ 2-105) excludes 'investment securities and things in action.' If this sale is regarded as a sale of the stock, it is excluded as a sale of an investment security; if it be regarded as a sale of the proprietary lease, with the stock being only incidental, it is excluded as the lease is plainly a thing in action. The article having no application, the common-law rule continues.[65]

There has been an appreciable rise in the use of cooperative apartments since the end of World War II.

> Growing urban populations created housing problems, especially for middle and lower income families. State and federal legislation was passed to encourage the building of apartments; cooperative apartment corporations shared in the benefits and many were built with financial support of the FHA.[66]

Due to this increase in the number of cooperative housing developments, coupled with the existing uncertainties as to the nature of the interest which the tenant obtains, it seems likely that increased litigation will ensue. The instant case exemplifies the manner in which these uncertainties may lead to more litigation. It appears that the points of disagreement stated by the dissent[67] are not points which are normally arguable and open to such dichotomous opinions, at least in light of applicable New York law.[68] Rather they would appear to be fundamental to the understanding and adjudication of an interest in a cooperative apartment. The instant case illustrates the inherent element of confusion regarding the proper treatment of the interest obtained in a cooperative apartment. In this connection, several considerations seem relevant. The cooperative apartment interest has characteristics similar to three other common housing interests: (1) the fee simple ownership of a single house; (2) the landlord-tenant

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65. Instant case at 174, 323 N.Y.S.2d at 47.

66. Miller, *Cooperative Apartments: Real Estate or Securities,* 45 B.U.L. REV. 465, 466 (1965).

67. The dissent in the instant case rested on five grounds:

1) interpreting the nature of the interest conveyed by looking to its substantive implications;
2) considering a lease for years as realty;
3) holding the sale of stock in a cooperative as a sale of investment securities;
4) holding a lease as a thing in action; and
5) considering the deposit as forfeited under the common law of the state even if the sale involved personalty.

Instant case at 173-75, 323 N.Y.S.2d at 46-47.

68. See cases cited *supra* notes 20 and 21.

relationship; and (3) the condominium.[69] In fee simple ownership, an individual receives the title to a house and a deed to the land upon which it is built; he pays taxes on his fee and usually must make mortgage payments. In the landlord-tenant form of ownership, the tenant-lessee has no fee ownership but only a lease which entitles him to occupy a particular space in a building for a specified time at a specified rent. Unlike the fee owner, the lessee obtains no real property interest in his dwelling.[70] In a condominum, the units are individually owned in fee simple, while the common elements are owned in fee simple in undivided percentages specified in the declaration of the condominium.[71] The real estate taxes and mortgage fees paid by the unit owner are deductible for federal tax purposes, just as they are in the case of fee simple ownership of a single home.[72] An owner of a condominium unit owns real property.[73] On the other hand, one authority has argued that a

> tenant-cooperator buys shares of stock in a corporation (choses in action—personal property) and obtains a lease to an apartment (which is a contract for the 'use' of real property, but not a real property interest itself) . . . . The ownership of stock and a contract of lease are not real property interests, even though the courts have, in several instances, chosen to ignore this simple fact.[74]

It seems, therefore, that the court in the instant case agrees that the substantial legal difference between the two closely analogous forms of multi-unit dwelling—condominium and cooperative—is that the interest in the former is realty, and the interest in the latter is personalty. The tenant-cooperator is not an "owner" of the apartment, but rather an owner of stock by which he gains the "right" to occupy a specific place for a specific time at a determinable

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69. P. ROHAN & M. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE § 1.02, at 1-3 to 1-6 (1967) [hereinafter cited as ROHAN & RESKIN].

70. *See* cases cited *supra* note 21.

71. *See* N.Y. REAL PROP. LAW § 339-e(5), (7), 339-i (McKinney 1968). *See also* ROHAN & RESKIN § 1.02(3), at 1-5.

72. ROHAN & RESKIN § 1.02(3), at 1-5.

73. Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.S.2d 321 (New York City Civ. Ct. 1964). *See also* N.Y. REAL PROP. LAW § 339-g (McKinney 1968); ROHAN & RESKIN § 1.03, at 1-7.

74. ROHAN & RESKIN § 1.03, at 1-7.

price—the same as any other leaseholder.[75] This is the pivotal distinction upon which the majority in the instant case relied.[76] To reach this result, the court indulged in an equation: proprietary lease (personalty) plus cooperative stock (personalty) equals the interest obtained in a cooperative apartment (also personalty).[77] However, was this equation correct, or did the court merely adopt it as a way to facilitate disposing of that issue? To answer this question, it is first necessary to determine the validity of the principal precedents upon which the majority relied: *Agar v. Orda,*[78] and *Susskind v. 1136 Tenants Corp.*[79] *Agar* dealt with a sale of corporate stock, holding the sale of such stock to be a sale of personalty for purposes regarding the return of a down payment. While this precedent may be germane in determining the nature of the stock interest conveyed, it is in no way related to any sort of lease interest. The court uses *Agar* to establish the nature of the stock in a cooperative;[80] however, *Agar* does not deal with cooperative stock. The other chief precedent, *Susskind,* seems at first glance to be very close in point to the instant case. It dealt with cooperative apartments, but in a context relating to liability for repairs of the apartments. True, *Susskind* holds that a leasehold in a cooperative apartment is personalty;[81] that case also stated that stock ownership does not affect the legal classification of such interest as personal property.[82] However, the authorities which the *Susskind* court cited for this latter proposition are section 202 (1) (8) of the Surrogate's Court Act and *In re Miller's Estate.*[83] The cited section of the Surrogate's

75. 1165 Fifth Ave. Corp. v. Alger, 288 N.Y. 67, 41 N.E.2d 461 (1942). *See also* ROHAN & RESKIN § 2.02 (5) (g), at 2-21.

76. Instant case at 172, 323 N.Y.S.2d at 45.

77. It does not appear that the pairing of the two together does anything to create a new classification of real estate.

Id.

78. 144 Misc. 149, 258 N.Y.S. 274 (Sup. Ct. 1932), *aff'd,* 239 App. Div. 827, 264 N.Y.S. 939 (1st Dep't 1933), *aff'd,* 264 N.Y. 248, 190 N.E. 479 (1934).

79. 43 Misc. 2d 588, 251 N.Y.S.2d 321 (New York City Civ. Ct. 1964).

80. Instant case at 169, 323 N.Y.S.2d at 42.

81. 43 Misc. 2d at 591, 251 N.Y.S.2d at 326.

82. *Id.*

83. 205 Misc. 770, 130 N.Y.S.2d 295 (Sur. Ct. 1954). This case involved the construction of a will. The court held the cooperative apartment lease and stock constituted personalty, and thus did not pass by devise of the real estate owned by the deceased. The court further stated that "the fact that stock ownership is prerequisite to the procurement of the lease would not seem to affect the legal classification of these assets." *Id.* at 771, 130 N.Y.S.2d at 296. It thus appears that the *Miller* court, as the *Susskind* and *Silverman* courts, found no problem in coupling the lease and stock interests and arriving at another personalty interest as the result.

Court Act has been replaced by section 13-1.1 of the New York Estates, Powers and Trusts Law.[84] Both this section and *Miller* deal with a lease interest for purposes of administering an estate. In fact the court in the instant case refers to these same authorities in supporting this proposition.[85] While the authorities may be helpful in supporting the concept of a lease as personalty, and while it is true that the Surrogate's Court in *Miller* held a cooperative lease interest as personalty, it is questionable whether these authorities constitute *strong* precedent for the equation in the instant case.

The result, however, would have been different had the case involved a condominium. As noted above, the interest in a condominium is a fee ownership, *i.e.*, realty.[86] The court, if it had applied its formalistic reasoning, would have no choice but to resolve the case differently. Since the condominium owner has a fee estate in the space which he occupies, the rules regarding realty damages would apply. Thus the dichotomy between condominium and cooperative would be maintained.[87] Even though the condominium seems to be the more desirable alternative,[88] the cooperative doggedly retains its place in the legal system of the state.

Whether or not the above distinction makes any *practical* sense is questionable. For example, tenants in a cooperative and owners of condominium units are given the same rights regarding

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84. N.Y. E.P.T.L. § 13-1.1 (a) (1) (McKinney 1967) provides:
(a) For purposes of the administration of an estate, the following assets of the decedent are personal property . . .
(1) Estates for years in real property . . . .

85. Instant case at 171, 323 N.Y.S.2d at 44.

86. *See* Note, *Condominium: A Reconciliation of Competing Interests?*, 18 VAND. L. REV. 1773, 1778 (1965).

87. This distinction is evidenced even in New York statutory provisions. Article 9-B of the Real Property Law (McKinney 1968) is entitled the "Condominium Act," while cooperative corporations seem to fall within Article 2 of the Cooperative Corporations Law (McKinney 1951). *See also* ROHAN & RESKIN § 3.02, at 3-3 to 3-5.

88. The cooperative arrangement appears to be less desirable than the condominium because of certain financial aspects. For example, for purposes of mortgage financing and real property taxation, the cooperator's "estate" lacks sufficient "personality" to support his individual obligation. The cooperative venture also requires that the tenants collectively meet the tax and debt obligations on their property. Refinancing is not possible unless all cooperators agree to refinance the blanket debts (BERGER at 173). For a broader perspective, see Berger, *The Condominium-Cooperative Comparison*, 11 PRAC. LAW. 37 (1965). *See generally* Comment, *Federal Assistance in Financing Middle-Income Cooperative Apartments*, 68 YALE L.J. 542 (1959); Note, *The Cooperative Apartment in Government-Assisted Low-Middle Income Housing*, 111 U. PA. L. REV. 638 (1963); Note, *Condominiums: Incorporation of the Common Elements—A Proposal*, 23 VAND. L. REV. 321 (1970).

federal tax deductions.[89] New York provides that a tenant shareholder may deduct the amount he paid to the corporation for real estate taxes under his personal income deductions.[90] The condominium unit owner's parcel, not including any personal property, is deemed to be subject to special assessment and taxation.[91] For tax purposes, then, the tenant shareholder is in much the same position as the fee owner. Both the cooperative and condominum are also entitled to FHA mortgage insurance.[92] A cooperative apartment corporation is run by a board of directors which either manages the apartment building directly or selects a manager. The operation of the building is governed by the duly adopted rules and regulations which are designed for securing the greatest good for the benefit of the members.[93] In like manner, the condominium is usually run by a manager appointed by the board of directors. The unit owner must comply with the rules and regulations which the management adopts so as not to encroach upon the rights of other unit owners.[94] Moreover, there may be a provision in the cooperator's proprietary lease which prohibits assignment of the lease and transfer of the corporate stock unless the board of dir-

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89. Tenants in a cooperative are allowed to deduct their proportionate share of the corporation's real estate taxes; INT. REV. CODE of 1954, § 216. Condominium apartment owners are entitled to deduct their own share of real estate taxes; Rev. Rul. 64-31, 1964-1 CUM. BULL. 300.

90. N.Y. TAX LAW, § 360(12) (McKinney 1966) provides that in computing net income, there shall be allowed as deductions:

> In the case of a tenant-stockholder, amounts, not otherwise deductible, paid or accrued to a cooperative apartment corporation within the taxable year, if such amounts represent that proportion of the real estate taxes on the apartment building and the land on which it is situated, paid or incurred by the corporation and allowable as deductions for income tax purposes, or of the interest paid or incurred by the corporation on its indebtedness contracted in the acquisition, construction, alteration, rehabilitation, or maintenance of such apartment building or in the acquisition of the land on which the building is located, which the stock of the corporation owned by the tenant-stockholder is of the total outstanding stock of the corporation, including that held by the corporation.

It is to be noted that under this provision, a cooperative apartment corporation is one in which eighty per cent or more of the gross income is derived from the tenant-stockholders.

91. N.Y. REAL PROP. LAW § 339-y (McKinney 1968).

92. 12 U.S.C. § 1715e (1950); 12 U.S.C. § 1715y (1961).

93. Forest Park Cooperative v. Hellman, 2 Misc. 2d 183, 152 N.Y.S.2d 685 (Sup. Ct. 1956); Vernon Manor Co-operative Apartments v. Salatino, 15 Misc. 2d 491, 178 N.Y.S.2d 895 (Westchester County Ct. 1958).

94. N.Y. REAL PROP. LAW § 339-i(4) (McKinney 1968).

ectors or a stipulated proportion of the other tenants agree.[95] The fee owner in the condominium may sell, rent, exchange, or mortgage his unit independently of his neighbors unless the bylaws provide otherwise.[96] In a cooperative, the tenant-stockholder is usually bound by his lease agreement to pay his proportionate share of the maintenance costs of the property, costs which are chargeable in common to all the tenant-stockholders.[97] In like manner, the unit owner in a condominium is charged for the common expenses[98] according to his respective common interest.

In view of these similarities, the distinction between cooperative and condominium may be viewed as an unnecessary bifurcation of the law.[99] On the other hand, this distinction may be merely an attempt by the judiciary to "pigeonhole" the interest obtained in a multi-unit dwelling by relating it to the artificial classification of such dwelling. If the latter is the case, then the courts would be well advised to take notice of the fact that more litigation is imminent. The housing situation is in a state of flux, with dwellings going from single house to apartment to cooperative to condominium to unlimited future possibilities. It is this flux which makes rigid classification impractical as new and different housing forms such as mobile homes and movable modular arrangements become more widely used. These will pose additional problems for the courts to solve. For example, what is the nature of the interest which one possesses in a mobile home? Presumably this type of housing will be moved from lot to lot. It therefore seems unlikely that the mobile home resident will seek fee ownership

95. Penthouse Properties, Inc. v. 1158 Fifth Ave., Inc., 256 App. Div. 685, 11 N.Y.S.2d 417 (1st Dep't 1939); Curtis v. Le May, 186 Misc. 853, 60 N.Y.S.2d 768 (N.Y. City Mun. Ct. 1945). It should be noted, however, that as a practical matter, it is usually easier for a condominium unit owner to transfer his property independently, than it is for a cooperative shareholder to gain the requisite consent of his fellow shareholders needed for transfer.

96. The bylaws may govern the alienation of the units, except that there shall be no provision restricting alienation because of race, creed, color, or national origin. N.Y. REAL PROP. LAW § 339-v (2) (a) (McKinney 1968).

97. Brigham Park Co-operative Apts. v. Lieberman, 158 N.Y.S.2d 135 (N.Y. City Mun. Ct. 1956).

98. Common expenses include the expenses incident to the operation of the property and all others designated common expenses by the Condominium Act or the bylaws. N.Y. REAL PROP. LAW § 339-e (4) (McKinney 1968).

99. At least one writer seems to view the distinction as unnecessary. *See* Wisner, *Financing the Condominium in New York: The Conventional Mortgage*, 31 ALBANY L. REV. 32, 33 (1967): "*Susskind v. 1136 Tenants Corp.* represents the sum total of New York and, perhaps, American case law on condominiums . . . ." The author must have dispensed with the distinction, for *Susskind* dealt with a cooperative apartment rather than a condominium.

in the space in which he parks his trailer. On the other hand, it seems logical to assume that the vast majority of people living in this manner will own the mobile home. It follows that, since they are renting a space to occupy, the logic of the instant case would dictate that they would be considered tenants, with the landlord-tenant concepts applying.[100] But unlike the typical tenant, the trailer resident usually owns his "apartment"; in this respect he is similar to a condominium unit owner. Strict classification does not lend itself to situations which so vary from the applied analogy. Thus, the "pigeonholing" evidenced in the instant case may not be flexible enough to meet similar future variations. What of the future, when modules come into use? These residences may conceivably be "plugged in" to a space in a modular tower. Here the modular owner may seek permanent fee-type rights to his space. The situation would be analogous to a condominium, with realty concepts applicable. This is so because of the ownership of both the module and the space by the resident. However, if the module owner is the vagabond type, he may wish only to rent the space. In such cases, it seems as though he becomes a tenant, rather than an owner (as regards the space), and is in a position similar to the present day mobile home owner, at least as far as the concepts espoused in the instant case are concerned.[101] The same difficulty regarding adequate classification of his interest will once again be evidenced.

The distinction between realty and personalty will undoubtedly continue to have significance in the future. Legal precedent dictates that there be different damage remedies for these different types of property. As desirable as this concept may be in a case in-

100. *Contra,* N.Y. REAL PROP. TAX LAW § 102 (12) (g) (McKinney 1960):

12. 'Real property,' 'property' or 'land' mean and include:

. . . .

(g) Forms of housing adaptable to motivation by a power connected thereto, commonly called 'trailers' or 'mobile homes' . . . .

But see Albany Discount Corp. v. Mohawk Nat'l Bank of Schenectady, 28 N.Y.2d 222, 269 N.E.2d 809, 321 N.Y.S.2d 94 (1971) in which a mobile home was held to be a motor vehicle (personalty) for purposes of article 9 of the U.C.C. relating to the necessity of filing to perfect a security interest in a motor vehicle required to be licensed or registered in the state.

101. The court in the principal case declined to consider the interest in a cooperative as being controlled by the way in which it is classified for tax purposes (*see* statutes cited *supra* notes 90-92). Rather it concentrated on the broader aspects of lease and stock interests. It therefore seems logical to conclude that it would disregard any similar future provisions (*see* discussion *supra* note 100) and would look again to the broader characteristics of a mobile or modular interest.

volving the traditional classifications of realty or personalty, its utility breaks down when it becomes necessary to consider a combined classification. If an individual owning his residential module rents a space in which to place it, should he be treated as a tenant because he is renting a space, or should he be considered a fee owner because he owns his "apartment"? Thus, the distinction between real and personal interests as regarding damages in the instant case becomes more and more difficult to apply. Rather than merely focusing on the legal differences and similarities, the courts should move away from relying on formalistic distinctions, and focus instead on the *practical* aspects of a given interest.

STANLEY W. VALKOSKY, JR.

TORTS—SPECIFIC INTENT TO INDEMNIFY INDEMNITEE FOR HIS ACTIVE NEGLIGENCE FOUND DESPITE EQUIVOCAL CONTRACT LANGUAGE

In November, 1964, a Shell service station exploded seriously injuring two employees. The explosion and ensuing fire were caused by a defective heater located inside the station. Both Shell Oil Company and Visconti, the tenant-operator of the station, were aware of the defect but took no remedial action. The employees brought suit against Shell who in turn impleaded Visconti on the basis of an indemnification clause contained in the service station lease. The indemnification clause stated that Visconti would indemnify Shell

> against any and all claims, suits, loss, cost and liability on account of injury or death of persons or damage to property . . . caused by or happening in connection with the premises . . . or the condition maintenance, possession or use thereof or the operations thereon.[1]

The trial court ruled for the plaintiffs in the principal action and for Shell as third-party plaintiff in the indemnification action.[2] The appellate division affirmed the verdict in favor of the employees but modified the judgment by dismissing Shell's third

1. Levine v. Shell Oil Co., 28 N.Y.2d 205, 210, 269 N.E.2d 799, 801, 321 N.Y.S.2d 81, 84 (1971) [hereinafter cited as instant case].
2. *Id.* at 206. 269 N.E.2d at 800, 321 N.Y.S.2d at 83.